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No. 06-1210

In the Supreme Court of the United States

GENERAL ELECTRIC COMPANY, PETITIONER

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether New Hampshire discriminates against foreign commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, by allowing the parent of an affiliated group of corporations to deduct, for purposes of determining taxable business profits, "such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary * * * whose gross business profits have already been subject to [New Hampshire's business profits tax] during the same taxable period." N.H. Rev. Stat. Ann. § 77-A:4, IV.

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. New Hampshire imposes a business profits tax (BPT) on business organizations that carry on business within the State. N.H. Rev. Stat. Ann. §§ 77-A:1, 77-A:2, 77-A:6, I. Such organizations are generally taxed as separate entities, but combined reporting is required for any "unitary business," *i.e.*, "one or more related business organizations engaged in business activity both within and without [the] state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." *Id.* §§ 77-A:1, I, XIV and XV, 77-A:6, IV. Under the combined reporting method,

the income of all organizations comprising the unitary business, other than "overseas business organizations," is aggregated. *Id.* § 77-A:1, XV and XVI. "Overseas business organizations" are "business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." *Id.* § 77-A:1, XIX. Thus, the combined report effectively includes only the net income of the domestic members of the unitary group, *i.e.*, the "water's edge combined group."[1] *Id.* § 77-A:1, XV. Although a foreign subsidiary is not considered part of the water's edge combined group, it may still qualify as a unitary member. *Id.* § 77-A:1, XIV and XV; Pet. App. 3a.

Any dividends paid from one member of the combined group to another are ignored in calculating the group's gross profits. Pet. App. 4a; N.H. Rev. Stat. Ann. § 77-A:3, I. The gross profits are then apportioned to the State pursuant to a statutory formula. *Id.* § 77-A:3. Any dividends paid by foreign subsidiaries that are members of the unitary group (but not the water's edge group) are apportioned separately and then added to the gross profits to produce "New Hampshire taxable business profits," which are taxed at the applicable rate. *Id.* §§ 77-A:2, A:3, II(b) and (b)(6).

Under a separate provision, N.H. Rev. Stat. Ann. § 77-A:4, IV (subsection IV), a parent corporation was permitted to deduct dividends received from a subsidiary of which the parent controls 80% of the stock, if the subsidiary paid BPT on its net profits during the same tax period. That provision authorized the following deduction:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the

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[1] Consistent with the parties' terminology (Pet. 4; Br. in Opp. 4), this brief will refer to overseas business organizations as foreign subsidiaries or foreign members, and non-overseas business organizations as domestic subsidiaries or domestic members.

> United States Internal Revenue Code[2] as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

Subsection IV. That dividends-received deduction "has traditionally been used by corporations with affiliates or subsidiaries that file separately, and not under the combined reporting method." Pet. App. 5a. The deduction was triggered only when, and to the extent that, the subsidiary's profits for the relevant tax period had been subjected to the BPT.[3] *Id.* at 11a-12a; Br. in Opp. 3, 9.

2. Petitioner General Electric Co. (GE) is a New York corporation with its principal place of business in Connecticut. GE and its subsidiaries conduct a unitary business throughout the United States and in certain foreign countries. Pet. App. 2a, 3a. During the tax years at issue (1990-1999), certain of GE's subsidiaries (hereinafter, its "foreign subsidiaries") did no business within the United States but were part of GE's unitary group and paid dividends to GE and its affiliates that were doing business within the United States. *Id.* at 3a, 53a-54a; Pet. 6.

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[2] Chapter 6 of the Internal Revenue Code provides rules for filing consolidated returns. A consolidated return generally may be filed by an affiliated group of corporations, connected through stock ownership of at least 80%, with a common parent. 26 U.S.C. 1504(a); see 26 U.S.C. 243(a)(3) and (b) (dividends-received deduction for affiliated groups).

[3] Subsection IV was repealed on June 18, 2007. The repeal was effective August 17, 2007. H.B. 598-FN-A, 2007 Sess. (N.H.) <http://gencourt.state.nh.us/legislation/2007/hb0598.html>.

GE has a place of business in New Hampshire (Pet. App. 50a) and is required to file a BPT return. See N.H. Rev. Stat. Ann. §§ 77-A:1, 77-A:2, 77-A:6, I. For the tax years at issue, GE used the combined reporting method to apportion the income of its unitary business to New Hampshire and calculate its BPT. Pet. App. 54a. Pursuant to New Hampshire law, GE paid BPT on an apportioned share of the dividends received by the water's edge group from its foreign subsidiaries.

GE sought a refund from respondent for the tax years in question, claiming that it had overpaid its BPT because it should have been, but was not, permitted to deduct the foreign dividends paid to the water's edge combined group in calculating taxable business profits. GE contended that subsection IV unconstitutionally discriminated against foreign commerce by granting a dividends-received deduction for dividends from foreign subsidiaries only when those subsidiaries do business in New Hampshire. The parties thereafter agreed that if it was determined that GE was entitled to the deduction, respondent would refund GE $ 3,154,738. Pet. App. 52a. Respondent denied GE's refund request. *Id.* at 53a.

3. GE sought judicial review in state superior court, which dismissed for lack of standing and rejected GE's claim on the merits. Pet. App. 22a-43a, 44a-49a. The court stated that GE "cannot escape the fact that it is a unitary business that filed a combined return for the tax years at issue and the plain and unambiguous language contained in [subsection IV] does not specifically address that type of business scenario." *Id.* at 32a-33a. The court therefore concluded that "[a]bsent a showing that [subsection IV] directly and specifically affects its rights, [GE] does not have standing to bring this lawsuit." *Id.* at 34a. In the alternative, the court held that "even assuming *arguendo* that [GE] has standing to bring this lawsuit, [GE]

fails to demonstrate how [subsection IV] is unconstitutional." *Id.* at 35a.

4. The Supreme Court of New Hampshire affirmed in part and reversed in part. Pet. App. 1a-21a. With respect to standing, the court concluded that the plain language of subsection IV made the dividends-received deduction available to the "parent of an affiliated group," as defined by the Internal Revenue Code, and held that GE met that definition. *Id.* at 6a-7a. The court further stated that "standing is conferred upon [GE] to challenge the statute for the very reason that it was denied the statute's benefit." *Id.* at 8a.

Turning to the constitutional question, the supreme court stated that this case involves a "hypothetical factual scenario" because GE "does not have any foreign subsidiaries that conduct business in the state" and "[i]t is uncertain, therefore, exactly how the state taxing regime, including [subsection IV], would operate if it did." Pet. App. 10a. The court noted respondent's insistence that subsection IV "never enters the analysis in a combined reporting regime," but declined to resolve the question. *Ibid.* Instead, the court "assume[d] without deciding that the parent of a foreign subsidiary doing business in the state might, under certain circumstances, be entitled to the dividend-received deduction in [subsection IV]." *Id.* at 10a-11a.

The supreme court then concluded that subsection IV did not facially discriminate against foreign commerce. Pet. App. 12a-21a. The court distinguished this case from *Kraft General Foods, Inc.* v. *Iowa Department of Revenue & Finance*, 505 U.S. 71 (1992), in which this Court struck down Iowa's taxing scheme that allowed a dividends-received deduction for dividends received from domestic, but not foreign, subsidiaries that did no business in Iowa and were not subject to Iowa's income tax. Pet. App. 14a-17a. The New Hampshire court reasoned that, in note 23 of the *Kraft* opinion, "the Court dis-

tinguishes between a single entity filing system [such as Iowa's] where income from out-of-state domestic subsidiaries is not taxed at all and a combined reporting method system where out-of-state domestic income is taxed through apportionment." *Id.* at 15a.

Relying on the principle that "a proper analysis must take the whole scheme of taxation into account," the court "assess[ed] New Hampshire's taxing regime as a whole" by examining "the aggregate tax imposed upon a unitary business," and found "no improper discriminatory treatment." Pet. App. 17a (quoting *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963)). The court observed that, in the case of a foreign subsidiary doing business in New Hampshire, the foreign subsidiary "must pay a tax apportioned upon its profits attributable to the state," but that "[a]ny dividends paid to a parent corporation also located within the state may be deducted * * * up to the amount of business profits already taxed," thus ensuring "that the income of the [unitary] business entity is taxed only once." *Id.* at 18a. The court determined that "[a]lthough the in-state parent is not taxed directly * * *, because by nature of the unitary business concept the parent and its subsidiary are considered a single business entity, it follows that the parent ultimately pays the BPT of its subsidiary." *Ibid.*

When, as in GE's situation, the foreign subsidiary does no business in New Hampshire, the court explained that the subsidiary "is not subject to the BPT and its income is therefore not directly taxed," but "any dividends paid to an in-state parent corporation are apportioned and taxed as income." Pet. App. 18a. The parent corporation is not entitled to a dividends-received deduction, because "that dividend income has been taxed only once." *Ibid.*

Accordingly, the court concluded that New Hampshire's taxing regime did not favor "the unitary business with the

foreign subsidiary operating in New Hampshire [over] the unitary business with the foreign subsidiary not operating in New Hampshire," because in each scenario, the unitary business is "only taxed once" on the dividend income. Pet. App. 18a. Because "there is no 'differential treatment' that benefits the former and burdens the latter" (*ibid.*) (citing *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994)), the court held that "[subsection IV] is not unconstitutional on its face." *Id.* at 21a.

DISCUSSION

The Supreme Court of New Hampshire correctly held that subsection IV does not facially discriminate against foreign commerce. That decision does not conflict with any decision of this Court or another state court of last resort. Moreover, subsection IV has been repealed, see note 3, *supra*, further undermining any need for this Court's review.

In addition, there is an unresolved antecedent question of state law that renders the question presented somewhat hypothetical in the present posture of the case. Based on the disposition below, it is unclear whether subsection IV would have been applicable under the combined reporting regime to a unitary business with a foreign subsidiary doing business in New Hampshire, and accordingly it is unclear whether the constitutional issue resolved by the court below was actually presented by New Hampshire's tax regime even before the repeal of the operative provision. For all of those reasons, further review is not warranted.

A. The Decision Below Is Correct

1. a. GE contends that subsection IV facially discriminates in violation of the Commerce Clause because it permits the parent of an affiliated foreign subsidiary to deduct from taxable business profits the dividends received from that subsidiary only to the extent that the subsidiary's income is sub-

ject to New Hampshire tax. According to GE (Pet. 14-15), New Hampshire's "regime favors corporations engaging in local activity over their out-of-state competitors and tends to discourage corporations from plying their trades in protected [foreign] commerce." The Supreme Court of New Hampshire correctly rejected that contention, which improperly focuses on only half of the relevant equation.

In deciding this case, the supreme court properly "assess[ed] New Hampshire's taxing regime as a whole and look[ed] at the aggregate tax imposed upon a unitary business." Pet. App. 17a. Under that analytical approach, the conclusion is inescapable that New Hampshire's tax regime did not discriminate against foreign commerce. As the supreme court correctly explained (*id.* at 17a-19a), the purportedly discriminatory tax benefit allegedly conferred by subsection IV (namely, a dividends-received deduction for a combined group to the extent that the income of its dividend-paying foreign subsidiary was taxed by New Hampshire) was fully matched by a corresponding burden on the purportedly favored unitary group (namely, the foreign subsidiary's obligation to pay New Hampshire tax on the income apportioned to the State). By contrast, that additional tax burden was *not* imposed on the purportedly disfavored unitary groups (like GE) that accordingly did not receive a dividends-received deduction, because by definition their dividend-paying foreign subsidiaries had no income taxable in New Hampshire.

As a result, New Hampshire's scheme as a whole did not facially discriminate against foreign commerce, because there was no showing that "the aggregate tax imposed upon a unitary business" would be higher if its foreign subsidiaries did no business in New Hampshire and lower if they did. Pet. App. 17a. New Hampshire "d[id] not favor business activity in the [State] over business activities abroad," which "suggest[s] that the statute does not discriminate against foreign

commerce." *Kraft Gen. Foods, Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79-80 (1992) (*Kraft*). There was no "differential treatment of in-state and [foreign] economic interests that benefits the former and burdens the latter," *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994), no "direct commercial advantage to local business," *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959), and no discrimination "in order to favor local commercial interests," *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 335 (1977). GE's claim of discrimination therefore fails.

b. GE does not dispute that, when the aggregate tax burdens imposed by New Hampshire's scheme on unitary businesses are considered, no discrimination can be demonstrated. GE contends (Pet. 18), however, that such analysis of aggregate tax burdens is inappropriate, and that the tax burden imposed on foreign subsidiaries doing business in New Hampshire must be ignored altogether in determining whether the State's tax regime discriminates against foreign commerce. In GE's view, it is simply irrelevant that the unitary group suffers no discrimination at all.

GE is mistaken. When confronting Commerce Clause challenges to state tax laws, this Court has repeatedly held that the proper mode of analysis entails a practical assessment of overall economic realities, not a hypertechnical exercise in arbitrary linedrawing. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). "In each case," the Court has said, "it is our duty to determine whether the statute under attack * * * will in its practical operation work discrimination." *Ibid.* (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)). "This concern with the actuality of operation, a dominant theme running through all state taxation cases,

extends to every aspect of the tax operations." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963). "[A] proper analysis must take 'the whole scheme of taxation into account.'" *Ibid.* (citation omitted).

GE's only response (Pet. 18) is to point to a footnote in *Kraft*, but *Kraft* provides no support for GE's counterintuitive position. That case involved a Commerce Clause challenge to Iowa's income-tax scheme, which allowed a corporate parent to deduct dividends received from domestic subsidiaries (including subsidiaries that had no Iowa taxable income), but did not permit such a deduction for dividends received from a foreign subsidiary on account of foreign business activity. *Kraft*, 505 U.S. at 74, 77.[4] Thus, under Iowa's scheme, Iowa did not tax *either* the income earned *or* the dividends paid by domestic subsidiaries with no Iowa operations, but it *did* tax the dividends received from foreign subsidiaries to the extent of their foreign operations. The Court held that Iowa's scheme facially discriminated against foreign commerce in violation of the Commerce Clause, because "Iowa imposes a burden on foreign subsidiaries that it does not impose on domestic subsidiaries." *Id.* at 80 (emphasis omitted).

In reaching that conclusion, the Court rejected the notion that the State's tax could be justified by looking to the effects of taxes imposed by *other* States and the United States. The Court explained that, "whatever the tax burdens imposed by the Federal Government or by other States, the fact remains that *Iowa* imposes a burden on foreign subsidiaries that it

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[4] Iowa used a single-entity reporting method, under which "Iowa does not directly tax the *income* of a subsidiary unless the subsidiary, itself, does business in Iowa. Thus, if a domestic subsidiary transacts business in Iowa, its *income* is taxed, but if it does not do business in Iowa, neither its income nor the dividends paid to its parent are taxed." *Kraft*, 505 U.S. at 74. The Court further observed that, unlike States that use a combined reporting method, "Iowa is not a State that taxes an apportioned share of the entire income of a unitary business, without regard for formal corporate lines." *Id.* at 74 n.9.

does not impose on domestic subsidiaries." *Kraft*, 505 U.S. at 80. In a footnote appended to that sentence, the Court also rejected any suggestion that Iowa's tax could be defended on the ground that it did not discriminate between domestic subsidiaries doing business in Iowa (whose income but not dividends would be taxed) and foreign subsidiaries doing business abroad (whose dividends but not income would be taxed). While acknowledging that no discrimination was evident as between those two categories of taxpayers, the Court stated that the relevant comparison was instead between "the taxpayers who are 'most similarly situated.'" *Id.* at 80 n.23. Given Iowa's scheme of taxation, "[a] corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad"; "the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary." *Ibid.* (citation omitted).

That footnote discussion plainly revolved around the peculiarities of the Iowa taxing regime at issue in *Kraft*, and cannot plausibly be read, as GE would have it, to preclude consideration of the tax burden imposed by New Hampshire on the foreign subsidiary of a unitary group that (hypothetically) obtained the benefit of the dividends-received deduction (at the price of subjecting the foreign subsidiary to New Hampshire tax). Under the Iowa scheme, there was no "independent basis" for taxing a foreign subsidiary that did no business in Iowa, because Iowa did not have a unitary tax scheme and taxed *no* subsidiaries except those doing business in Iowa. *Kraft*, 505 U.S. at 80 n.23. Moreover, the Court in *Kraft* made clear that the relevant focus, and "more appropriate comparison," under Iowa's regime was "between corporations whose subsidiaries do not do business in Iowa" (*ibid.*), because the aggregate effect of Iowa's tax scheme *was* to impose a dis-

criminatory tax burden on those unitary businesses depending on whether their subsidiaries were foreign or domestic.

No such discriminatory effect existed under New Hampshire's tax regime. Under the unitary approach to determination of taxable income, New Hampshire would have had an "independent" basis for taxing an apportioned share of the income of foreign subsidiaries doing no business in New Hampshire, and in lieu thereof was entitled to tax the dividends paid by such subsidiaries to members of a water's edge group, which represented value earned by such members. See *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 440 (1980). Given that the *income* of unitary foreign subsidiaries with no New Hampshire business activity was not subject to tax, there was no need or justification for a dividends-received deduction with respect to dividends from those subsidiaries. Whether foreign or domestic, in-state or out-of-state, subsidiaries included within a unitary group were subjected to equivalent tax burdens under New Hampshire's regime: the State taxed either their income or their dividends, but not both (and tailored the dividends-received deduction to ensure that neither double taxation nor tax exemption resulted). The same could not be said of Iowa's scheme, in which dividends paid by foreign subsidiaries with no Iowa operations were subject to tax, but *neither* the dividends *nor* the income of similarly situated domestic subsidiaries was taxed.[5]

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[5] While GE emphasizes the fact that a foreign subsidiary would have to file a separate BPT return under New Hampshire law, that fact is merely a consequence of the unitary group's own *election* to exclude its foreign subsidiary from the combined report, see N.H. Rev. Stat. Ann. § 77-A:1, XV(a) and (b). Moreover, separate reporting does not change the reality that the subsidiary is part of the unitary business, which will bear the financial burden of the tax that the subsidiary pays. See *Mobil Oil*, 445 U.S. at 438 (a unitary business is characterized by "functional integration, centralization of management, and economies of scale"). It is worth noting, moreover, that the "water's edge"

Far from providing support for GE's notion that the tax burden imposed on foreign subsidiaries doing business in New Hampshire must be ignored in evaluating GE's claim of discrimination, *Kraft* instead reaffirms the principle that the proper focus is on the aggregate effect of the State's tax statute. The Court observed that "[w]e have no reason to doubt" that "[i]n evaluating the alleged facial discrimination effected by the [challenged] tax, *it is not proper to ignore the operation of other provisions of the same statute.*" *Kraft*, 505 U.S. at 80-81 (citation omitted; emphasis added; second pair of brackets in original). When New Hampshire's tax regime is considered as a whole, it is clear that New Hampshire does not favor unitary businesses whose foreign subsidiaries operate in New Hampshire over unitary businesses whose foreign subsidiaries do no business in New Hampshire.[6]

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regime adopted by New Hampshire, which permits the foreign subsidiary doing business in New Hampshire to file a separate return by virtue of its geographic location, came about after States, including New Hampshire, were criticized for using a "worldwide combined reporting" system, under which a foreign subsidiary's income was automatically included in the unitary corporate parent's tax base. See Courtenay Ellis & Michael Quigley, *Barclays Bank—The Continuing Controversy Over Worldwide Unitary Taxation*, *available in* West law, 1994-WTR Fed. B.A. Sec. Tax'n Rep., 1 at *2-*3 (observing that this Court's decision in *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983), which "upheld the constitutionality of worldwide combined reporting of a [domestic-based] unitary business," triggered "a great deal of criticism from both U.S. and foreign-based multinational corporations" and ultimately led to a report issued under the auspices of the United States Department of the Treasury which "recommend[ed] that states voluntarily limit their taxation of so-called 'unitary' multinational businesses to U.S. 'water's edge (i.e. U.S.-generated) income"); *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 306, 324-327 (1994) (discussing criticisms of unitary taxation and observing that many States had shifted from worldwide reporting to the "water's edge" approach).

[6] Other state supreme courts have employed similar reasoning in consistently rejecting claims of facial discrimination directed against analogous state tax regimes. See *E.I. Du Pont de Nemours & Co.* v. *State Tax Assessor*, 675 A.2d 82 (Me. 1996); *In re Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993).

B. The Decision Below Does Not Conflict With Decisions Of This Court Or Any State Court Of Last Resort

1. Contrary to GE's assertions (Pet. 13-17), there is no conflict between the decision below and this Court's decisions in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). In *Fulton*, the Court held that a North Carolina intangible property tax imposed on the value of corporate stock violated the Commerce Clause. The tax was levied on the fair market value of corporate stock owned by North Carolina residents. *Fulton*, 516 U.S. at 327. Stockholders were entitled to a tax deduction based on the proportion of the issuing corporation's income that was subject to North Carolina tax. *Id.* at 328. For example, if a corporation did all its business in North Carolina, and thus paid North Carolina tax on 100% of its income, stockholders could deduct 100% of the value of their stock, resulting in no intangibles tax. By contrast, stock in a corporation doing no business in North Carolina, and thus paying no North Carolina income tax, was taxable at 100% of its value. The Court concluded that the intangibles tax facially discriminated against interstate commerce because "[a] regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Id.* at 333. The Court noted that the State "practically concede[d] as much" and sought, instead, to defend the tax (unsuccessfully) on the ground that it "compensate[d] for the burden of the general corporate income tax

paid by corporations doing business in North Carolina." *Id.* at 334.[7]

As the court below correctly concluded, *Fulton* is "not analogous" to the present case. Pet. App. 20a. Unlike *Fulton*, this case involves determining the taxable income of a unitary business. As discussed (pp. 12-13, *supra*), New Hampshire's combined reporting method treated dividends paid by domestic group members differently from dividends paid by foreign members only because the income of the domestic members is included in the apportionable tax base, whereas the overseas income of foreign members is not (even though the Commerce Clause would have permitted its inclusion). The deduction afforded by subsection IV was available only if the foreign member was itself subject to the BPT, so that the operating income of the unitary business was not counted twice in determining its tax.

The provision at issue in *Fulton*, by contrast, did not operate to equalize the application of a unified income tax to the various facets of a unitary business. Instead, *Fulton* involved an "apples to oranges" comparison (516 U.S. at 337): the affirmative imposition of a *property* tax on North Carolina residents with respect to which the State allowed a reduction in the property's taxable value based on a *separate* economic actor's level of in-state activity and *income* tax paid. There was no unity of business between the issuing corporation and the taxpaying stockholder, and no equalization of burdens

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[7] A facially discriminatory tax may survive Commerce Clause scrutiny if it is a compensatory tax designed to make interstate commerce bear a burden already borne by intrastate commerce. *Fulton*, 516 U.S. at 331. To qualify as a compensatory tax, the State must (1) identify the intrastate tax burden for which it is attempting to compensate; (2) show that the tax on interstate commerce roughly approximates, but does not exceed, the tax on intrastate commerce; and (3) show that the events on which interstate and intrastate taxes are imposed are sufficiently similar in substance to serve as mutually exclusive proxies. *Id.* at 332-333.

under a single taxing statute. The *Fulton* Court was therefore required to test the North Carolina statute against the standards applicable to allegedly "compensatory" taxes. *Id.* at 334. Those standards have no application here, where the allegedly discriminatory tax benefit pertained to the same tax and the same economic actor (*i.e.*, the unitary business) as the corresponding and equivalent tax burden (*i.e.*, the tax imposed on a foreign subsidiary doing business in New Hampshire). Unlike the tax in *Fulton*, subsection IV "enable[d] in-state and out-of-state businesses to compete on a footing of equality," *id.* at 340, and it was therefore not facially discriminatory, and thus there is no reason to reach the "compensatory" tax question.

Boston Stock Exchange is likewise inapposite. That case involved a New York transfer tax on securities transactions occurring, at least in part, in New York. In order to protect in-state stock exchanges from losing sales to exchanges located in other States that imposed no tax, New York amended the transfer tax to provide, for certain taxpayers, a 50% reduction in the tax rate when the transaction involved an in-state sale, and, for all taxpayers, a maximum liability of $350 for a single transaction involving an in-state sale. *Boston Stock Exch.*, 429 U.S. at 323-328. The Court held that "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. It rejected the State's contention that the amendment compensated New York for the competitive disadvantage created by the transfer tax, stating that "the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister states." *Ibid.*

Unlike the tax at issue in *Boston Stock Exchange*, New Hampshire's dividend-received deduction had neither the purpose nor the practical effect of giving a "direct commercial

advantage" (429 U.S. at 329) to unitary businesses with foreign subsidiaries doing business in New Hampshire at the expense of unitary businesses whose foreign subsidiaries did no such business. As discussed, the sole purpose and effect of subsection IV in this context was to determine the proper taxable income of the unitary business and, in particular, to avoid counting dividend income twice. Thus, for a unitary business, the decision whether to have its foreign subsidiaries do business in New Hampshire was essentially tax-neutral. See Pet. App. 18a-19a. This case therefore does not present the type of "direct commercial advantage" for in-state businesses at issue in *Boston Stock Exchange*.

2. There is no conflict between the decision below and the decision of any state court of last resort. GE alleges (Pet. 11-13) that the decision below conflicts with *D.D.I., Inc.* v. *State*, 657 N.W.2d 228 (N.D. 2003) (*DDI*), in which the Supreme Court of North Dakota held unconstitutional a dividends-received deduction provision that, according to GE, "in all essential respects was identical to New Hampshire's." Pet. 12. But the State conceded in *DDI* that the taxing scheme facially discriminated against interstate commerce, and sought to defend the scheme only on the basis that it was compensatory. 657 N.W. 2d at 231. Thus, the court in that case had no occasion to consider the threshold question of facial discrimination at issue here.

In any event, the taxing scheme at issue in *DDI* was substantially different from the one at issue here. Subsection IV applied only in circumstances of common ownership; the parent corporation had to control a minimum of 80% of the subsidiary's stock in order to qualify for the dividends-received deduction. Moreover, in the context of a unitary business with a dividend-paying foreign subsidiary, the New Hampshire provision operated to ensure that the unitary business paid tax only once on the income reflected in the dividend. The

provision invalidated in *DDI*, by contrast, was not narrowly tailored to prevent double taxation of the identical gross business profits of a unitary business or a group of corporations under common control. To the contrary, the dividends-received deduction in *DDI* was available to any corporation owning any amount of stock in another corporation that paid income tax to the State.*

GE also alleges (Pet. 12-13) a conflict between the decision below and a series of California court of appeal decisions invalidating two dividends-received-deduction statutes. See *General Motors Corp.* v. *Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Ct. App. 2004), aff'd in part and rev'd in part on other grounds, 139 P.3d 1183 (Cal. 2006); *Farmer Bros. Co.* v. *Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), rev. denied, No. B160061 (Cal. Aug. 27, 2003), cert. denied, 540 U.S. 1178 (2004); *Ceridian Corp.* v. *Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Ct. App. 2000). None of those decisions, how-

* GE asserts (Pet. Reply Br. 4) that the dividends at issue in *DDI* "were held to be apportionable" and "thus necessarily arose from the conduct of a unitary business in North Dakota." The fact that the dividends were "apportionable," however, does not necessarily implicate a unitary business, as North Dakota required "any taxpayer having income from business activity which is taxable both within and without this state" to apportion its income. N.D. Cent. Code § 57-38.1-02 (2005). Moreover, "[b]usiness income" includes "income from tangible and intangible property if the acquisition, management, and disposition of property constitute integral parts of the taxpayer's regular trade or business." *Id.* § 57-38.1-01. In *DDI*, because the taxpayers were engaged in the business of "managing assets" (657 N.W.2d at 229), dividends received from non-unitary corporations may well have constituted "business income." Furthermore, a unitary business filing a combined return would have excluded dividends paid by unitary-group members from income altogether, as intergroup transfers. See *Amerada Hess Corp.* v. *State*, 704 N.W.2d 8, 11 (N.D. 2005). Thus, if the dividends at issue in *DDI* had been paid from unitary sources, as GE contends, they would have been excluded from taxation altogether, and the dividends-received deduction struck down by the court would not have been implicated.

ever, has been reviewed by the Supreme Court of California.[9] See Sup. Ct. R. 10(b). Moreover, another decision of the California court of appeal upheld California's differential treatment of domestic and foreign subsidiary dividends in the context of a water's edge group filing a combined return. See *Fujitsu IT Holdings, Inc.* v. *Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473, 487-490 (Ct. App. 2004).[10] A conflict among decisions of California's intermediate appellate court does not merit this Court's review.

C. Other Factors Counsel Against Plenary Review

Further review is also unwarranted because the New Hampshire legislature has repealed subsection IV effective August 17, 2007. See H.B. 598-FN-A, 2007 Sess. (N.H.) <http://gen-court.state.nh.us/legislation/2007/hb0598.html>. Thus, the precise issue presented in the petition for a writ of certiorari appears to lack substantial recurring importance. Petitioner asserts (Pet. Reply to Supp. Br. 2-4) that the same issue would arise in the absence of subsection IV by virtue of the state constitution, but that issue of state law is best addressed by the state courts in a future case that actually presents the question.

In addition, the theory of discrimination advanced by GE is predicated on a disputed interpretation of subsection IV

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[9] The California Supreme Court affirmed in part and reversed in part portions of the court of appeal's decision in *General Motors*, but it did not review the portion of the decision addressing the constitutionality of the dividends-received deduction. See *General Motors Corp.* v. *Franchise Tax Bd.*, 139 P.3d 1183 (Cal. 2006).

[10] GE contends (Pet. Reply 6-7 n.1) that *Fujitsu* is unlike this case, because there, the "income of [the] domestic dividend payor is included in [the] tax base under [the] combined report." As discussed, however, the fact that New Hampshire permits a foreign subsidiary doing business in New Hampshire to file a separate return does not mean that the unitary group escapes the economic burden of the tax formally imposed on the subsidiary.

that has yet to be adopted by the New Hampshire courts. GE's theory depends on the threshold assumption that a water's edge combined group would be eligible for the dividends-received deduction afforded by subsection IV if the foreign subsidiary paying the dividend were subject to New Hampshire's BPT. Respondent has contended throughout these proceedings, however, that subsection IV was not available to corporations filing a combined report, regardless of whether the foreign dividend-payor is subject to the BPT. Br. in Opp. 8, 24-25; Pet. App. 7a-8a, 30a, 33a-34a. The court below did not resolve that question, instead merely "assum[ing] without deciding that" GE's interpretation was correct. Pet. App. 10a-11a. In light of this Court's instruction "never to anticipate a question of constitutional law in advance of the necessity of deciding it," *Liverpool, N.Y. & Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885), further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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